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**FILED**  
DISTRICT COURT OF GUAM  
JUN 21 2007  
MARY L.M. MORAN  
CLERK OF COURT

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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF GUAM**

11 UNITED STATES OF AMERICA,  
12  
13 Plaintiff,

14 vs.

15 BRIAN ELM,  
16 Defendant.

CRIMINAL CASE NO. 07-00026

**UNITED STATES RESPONSE TO  
DEFENDANT'S MOTION IN  
LIMINE AND TO THE PROPOSED  
REDACTION OF GOVERNMENT'S  
EXHIBIT 2**

**I. THE TESTIMONY OF MARIA CRUZ**

19 The defendant objects to the proposed testimony of U.S. Probation Officer Maria Cruz,  
20 which will, in part, concern the information attached hereto as Exhibit 4, the chart which the  
21 government proposes to introduce at trial. Ms. Cruz will testify that in the course of preparing  
22 the presentence report, she attempted to interview the defendant, but he refused to talk to her  
23 because he was going to appeal his conviction. She will also testify to what occurred at the  
24 sentencing hearing. During the course of her testimony, she will condense the sentencing issue  
25 to understandable terms: if defendant admitted that between June, 2004, and June, 2005, he  
26 conspired to distribute between 5 and 50 grams of ice, he would be eligible for a substantial  
27 reduction in his sentence. Defendant contends that the motive for admitting this criminal  
28 conduct at sentencing, after flatly denying it at trial, does not qualify as relevant evidence

1 pursuant to Federal Rule of Evidence 401.

2 Defendant correctly cites FRE 401, that relevant evidence “means evidence having any  
3 tendency to make the existence of any fact that is of consequence to the determination of the  
4 action more probable or less probable than it would be without the evidence.” (Emphasis added.)  
5 This is a very liberal standard. In weighing the relevancy of a proffered fact, the Advisory  
6 Committee Notes explain that one must look to the “relation between an item of evidence and a  
7 matter properly provable in the case.” “Whether the relationship exists depends upon principles  
8 evolved by experience or science, applied logically to the situation at hand.” The Notes also  
9 point out that the proffered fact need not be in dispute. “Evidence which is essentially  
10 background in nature can scarcely be said to involve disputed matter, yet it is universally offered  
11 and admitted as an aid to understanding.”

12 This evidence is useful to explain what otherwise is a logical disconnect: why the  
13 defendant would adamantly deny at trial that he had any involvement in this drug trafficking  
14 ring, assert that he was going to appeal his conviction, then do an about-face and admit at  
15 sentencing that he was in fact guilty, an admission which doomed the success of any appeal. The  
16 jury is entitled to hear this evidence, which tends to show that the defendant is an opportunist  
17 who will manipulate the legal system, without scruple, to gain a desired advantage. He lied at  
18 trial to avoid a conviction; he told the truth at sentencing to gain a lower sentence.

19 In addition, defendant’s objection to Ms. Cruz’ testimony makes no sense, because he has  
20 not objected to the admission of Exhibit 3, the transcript of the sentencing hearing. The real  
21 reason for this motion in limine appears to be, to prevent a live witness testifying about what  
22 occurred at sentencing, thereby making the presentation of the government’s case even more  
23 boring than anticipated.

## 24 II. THE REDACTION OF PAGES 45-48 OF EXHIBIT 2


25 Defendant also proposes to redact pages 45-48 of defendant’s trial testimony. The  
26 government objects to this redaction, which consists of the last half of his testimony about events  
27 which lead to his conviction, as reflected in Trial Exhibit 31, for felon in possession of a firearm,  
28 and his testimony about the ownership of certain motorcycles, despite having almost no income.

1 Defendant admitted lying to the arresting officer about not knowing that ice and a firearm was in  
2 his backpack. In response to the logical question that followed this admission, i.e., that he lied to  
3 avoid a criminal charge, he responded "I don't know." This testimony was relevant to  
4 defendant's state of mind while he was on the witness stand. He has not cited any rule which  
5 would require that this portion of the transcript be suppressed.

6 Respectfully submitted this 21<sup>st</sup> day of June, 2007.

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10 By:

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# SENTENCING GUIDELINES

LEVEL 28: 110-137 months

-2 for acceptance of responsibility

LEVEL 26: 92-115 months

Exhibit 4